

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

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75-1257

To be argued by
BANCROFT LITTLEFIELD, JR.

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 75-1257

UNITED STATES OF AMERICA,

Appellee,

—v.—

JORGE DABED-SUMAR,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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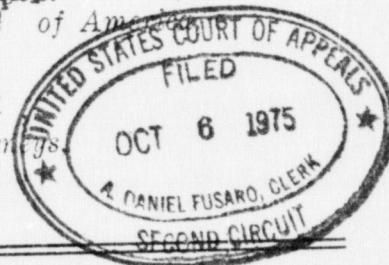


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United States Court of Appeals
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Docket No. 75-1257

UNITED STATES OF AMERICA,

Appellee.

—v.—

JORGE DABED-SUMAR,
Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jorge Dabed-Sumar ("Dabed") appeals from a judgment of conviction entered on June 26, 1975, in the United States District Court for the Southern District of New York, after a five day trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 74 Cr. 977 filed on October 17, 1974 charged Jorge Dabed-Sumar in Count One with conspiracy to sell cocaine, import it into the United States, and distribute and possess it with intent to distribute, in Count Two with importing two kilograms of cocaine into the United States, in Count Three with importing four kilograms of cocaine into the United States, in Count Four with distributing and possessing with intent to distribute eight kilograms of cocaine, and in Count Five with im-

porting eight kilograms of cocaine into the United States, in violation of Title 21, United States Code, Sections 173, 174, 812, 841(a)(1), 841(b)(1)(A), 846, 952(a), 960(a)(1), 960(b)(1), and 963 and Title 18, United States Code, Section 2.

The trial commenced on May 8, 1975 on Counts One and Five and concluded on May 14, 1975, when the jury found Dabed guilty on both counts. On June 26, 1975 Dabed was sentenced by Judge Gagliardi to concurrent terms of 4½ years imprisonment on each count to be followed by a special parole term of three years. Dabed is presently serving his sentence.*

Statement of Facts

The only issue raised on this appeal concerns whether Dabed was legally brought to the United States to stand trial. No issue is raised as to the sufficiency of the evidence or the conduct of the trial. Accordingly only a brief statement of the underlying facts is set forth.

* Dabed was tried twice on Indictment 74 Cr. 977. The first trial ended with his conviction on Counts One and Five on December 20, 1974. Prior to the submission of the case to the jury at the first trial Counts Three and Four were dismissed with the consent of the Government. The jury found Dabed guilty on Counts One and Five and not guilty on Count Two. Following the conviction, Dabed's motion for a new trial was granted by Judge Gagliardi. At the second trial therefore only Counts One and Five were submitted to the jury.

Dabed was also indicted for similar violations of the Federal narcotics laws in Indictments 73 Cr. 1098 filed on December 6, 1973 and 74 Cr. 465 filed on May 6, 1974. After his conviction on Indictment 74 Cr. 977, orders of *nolle prosequi* were filed as to him on Indictments 73 Cr. 1098 and 74 Cr. 465.

A. The Trial

1. The Government's Case

The three principal Government witnesses at trial, Adolfo Sobocki-Tobias, Juan Carlos Canonico and Selim Valenzuela, each a convicted South American cocaine trafficker, testified that from 1968 to 1973, Jorge Dabed-Sumar supplied them with over 100 kilograms of cocaine to be smuggled into and sold in the United States. The witnesses described a series of transactions with Dabed during these years in which he delivered cocaine to them at hotels in Arica and Vina del Mar, Chile, and Tacna, Peru, and at his factory, at their homes and on the streets in Santiago, Chile, for between \$2,000 and \$3,000 United States dollars per kilogram. They also described how the cocaine, later sold in New York, was smuggled into the United States in shoulder pads of women's dresses, in emptied aerosol cans, in whiskey and wine bottles, in milk cans, on ships and planes and in trucks and cars.

2. The Defense Case

Dabed did not testify on his own behalf, but called Francisco Guinart, a convicted Chilean narcotics dealer, who testified he had known Dabed in Chile, had not had narcotics transactions with Dabed and had not known Dabed to be a cocaine trafficker.

3. The Government's Rebuttal Case

Special Agent John Raftery of the Drug Enforcement Administration testified that when Guinart was first brought to the United States he cooperated with the Government and made a lengthy statement to Agent Raftery

describing his transactions in narcotics with, among others, Jorge Dabed Sumar.*

B. The *Toscanino* Hearing

On November 18, 1974, prior to his first trial, Dabed moved orally under *United States v. Toscanino*, 500 F.2d 267, rehearing denied, 504 F.2d 1380 (2d Cir. 1974) for a hearing on whether he had been brought to the United States illegally. On the basis of an offer of proof by his counsel, Dabed was called to testify before Judge Gagliardi. The Government in response filed an affidavit of Special Agent Charles W. Cecil of the Santiago office of the Drug Enforcement Administration; the affidavit had been prepared prior to Dabed's testimony in anticipation that such a motion would be made but without knowledge of the specific allegations Dabed would make. Following Dabed's testimony Judge Gagliardi denied the motion, finding in fact that Dabed had not asserted any connection between allegations of torture and his presence in the United States or made out any claim entitling him to relief under *Toscanino*.

Certain of the facts and circumstances underlying Dabed's allegations were uncontested. Those were that

* Both the Government and the defendant called several witnesses in addition to those named above. The Government's additional witnesses essentially corroborated aspects of the testimony of Sobocki and Canonico. The defense witnesses testified concerning an affidavit signed by Canonico while he was incarcerated in the Federal Detention Headquarters with Dabed which was inconsistent with his trial testimony. The affidavit stated that Canonico had not had narcotics transactions with Dabed. Canonico testified that the affidavit was false and that he had been forced to sign it in West Street because if he had not he would have been exposed to the inmates as a cooperating witness.

Raftery's testimony described above was admitted only on the issue of Guinart's credibility.

on December 6, 1973, Indictment 73 Cr. 1098 was filed naming Dabed as a defendant, and that warrants issued; that prior to May 3, 1974 the Drug Enforcement Administration requested Dabed's expulsion from Chile; that on May 3, 1974, Enrique Monteiro Marx, Undersecretary of Interior for the Republic of Chile signed Decree No. 807 expelling from Chile, Dabed and five other Chilean citizens indicted in the United States;* that on May 4, 1975 Dabed and the five other subjects of the expulsion decree were flown from Santiago, Chile to New York on a Braniff flight, arrangements for which were made by agents of the Drug Enforcement Administration, and on May 5, 1975 were arrested in New York by the Drug Enforcement Administration.

1. Dabed's Testimony

Dabed's testimony at the hearing concerned his arrest, detention and torture by Chilean police on four separate occasions between October, 1973 and April, 1974, after the last of which he was brought to the United States.

Dabed testified that on October 16, 1973, an American, whom he later learned was a Drug Enforcement Administration agent named Jorge Frangulis, came to Dabed's factory in Santiago, preceded by two Chilean informants, and said he had been informed Dabed could get him drugs. Dabed said he was not involved in that kind of business and ordered Frangulis out of his office. Frangulis left and two minutes later 31 members of the Chilean police with Frangulis and another American agent entered Dabed's factory. The Chileans arrested Dabed and handcuffed him. They kicked and slapped him and threatened

* One of whom was Rafael Mellafe, whose case has already been before this Court in *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975).

him in the presence of Agent Frangulis. They then handcuffed various employees and others in the factory and made them lie on the floor. The police searched the factory and found no drugs but made Dabed sign an inventory for cartons of automobile spare parts which they found in the factory.

Dabed testified he was then taken by the Chileans to the 6th Precinct Chilean police headquarters, where he was stripped, blindfolded and tortured. While he was being tortured he heard persons speaking in English several times. The next day he was taken by the Chilean Police to court and then to another office of the Chilean police on the lower floors of a building. He said he saw Americans working elsewhere in the building. In the police office he was badly treated and threatened by the Chilean police, who on occasion spoke to others in English. The next day Dabed was again taken to court, where, he said, the judge was preparing to free him when the Chilean police said that they had found a bag containing white powder, which assuredly was drugs, across from his factory. He was held in prison on the drug charge until December 22, 1973 when, he was acquitted because, he said, the bag did not contain drugs. (Tr. 6-14).*

Dabed testified he was arrested a second time by the Chilean police on or about December 30, 1973. He said he had prepared a wedding party for his daughter at his house when 30 policemen appeared, arrested him and took him again to the 6th Precinct police office where he was questioned, stripped and tortured. On this occasion, after he had been detained for one hour, Dabed spoke to a Major Fontaine, who told him the arrest had been a mistake. Dabed was thereupon released. (Tr. 15-18).

* "Tr." refers to pages in the transcript of the *Toscanino* hearing on November 18, 1974.

Dabed testified his third arrest took place on February 15, 1974. Again he was taken by the Chilean police to the 6th Precinct police office and tortured in a back room at the precinct offices. On this occasion during the night he heard two people speaking English. Ten minutes after he had been returned to his cell from the torture room he saw a man coming out of the room where he had been tortured who was addressed by a Chilean policeman as "Mr. Cecil, Mr. Cecil". Dabed said he later learned this person was American Drug Enforcement Administration Agent Charles W. Cecil, Jr. On February 17, 1974, Dabed was released from the 6th Precinct and returned home. (Tr. 18-22).

The fourth arrest, Dabed said, occurred in April, 1974 at his home at 10:35 in the evening. The arrest was made by a Chilean police lieutenant who carried a machine gun. Dabed was taken on this occasion to a different police precinct near his home. On this occasion he was not tortured or threatened. On the morning of the next day, April 16, he was taken to a prisoner of war camp, the Chilean stadium, where he was held until April 22, although, he testified, his wife had obtained a habeas corpus from the Supreme Court of Chile. As he was taken into the stadium he saw a document indicating that he had been arrested under an order of the Bureau of Narcotics of the United States, that the Chilean Supreme Court would hear his case and he might be sent to the United States.

On April 22, he was taken from the stadium to the naval prosecutor's office in Valparaiso and held in a cell incommunicado for 8 days. On May 3, 1974 he was taken from Valparaiso in a bus with six others back to Santiago. The next day he and the others were taken to the international airport at Pudahuel in Chile. At the airport his blood pressure was taken by a physician who also gave him pills to relax. Present at the airport was

Drug Enforcement Agent Cecil who handcuffed him and with the Chilean police escorted him to a Braniff plane. Agent Cecil and Agent Frangulis together with the doctor and Chilean police accompanied Dabed and the other prisoners on the flight to Lima, where, Agent Frangulis left the flight and the others continued. (Tr. 22-39).

2. Cecil's Affidavit

"UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Cr. 1098

UNITED STATES OF AMERICA,

—v.—

JORGE DABED-SUMAR,

Defendant.

State of New York
County of New York
Southern District of New York ss.:

CHARLES W. CECIL, JR., being duly sworn deposes and says:

1. I am a Special Agent for the Drug Enforcement Administration, United States Department of Justice and have been so employed since June 29, 1969. Since August, 1972 I have been assigned to the Santiago, Chile District Office of the Drug Enforcement Administration. Previously I served five months at the Buenos Aires Argentina office of the Drug Enforcement Administration, four months at the Panama office of the Drug Enforcement Administration, and two years, two months in Washing-

ton, D.C. I am familiar with the matter of Jorge Dabed-Sumar, because of my presence in Santiago, Chile, for the last two years, two months.

2. The facts of which I am aware concerning the arrest, expulsion and transfer of Jorge Dabed-Sumar to New York from Chile are as follows:

3. On February 14, 1974, the Overseas Operations Section, of the Drug Enforcement Administration in Washington, D.C., advised the Santiago District Office of the Drug Enforcement Administration that Jorge Dabed-Sumar was among a number of persons indicted in the Southern District of New York. Thereafter the Santiago District Office of the Drug Enforcement Administration advised the Chilean police of the existence of the United States warrant against Jorge Dabed-Sumar. On April 17, 1974, the Southern [(sic) Santiago] District cabled the Overseas Operations Section stating that Jorge Dabed-Sumar was at that time incarcerated in Chile.

4. Thereafter I made arrangements for a flight to New York for Dabed-Sumar and five other defendants, such flight to leave after the order of expulsion had been signed by the Chilean authorities. On May 3, 1974 the order of expulsion on Jorge Dabed-Sumar and five other defendants was signed by the Chilean authorities. (A copy of the order of expulsion and a translation thereof is attached hereto as Exhibit A).

5. The first time I ever saw Jorge Dabed-Sumar was when he was brought on to Braniff Flight 988 on Saturday, May 4, 1974 at approximately 6:00 p.m., at the Pudahuel International Airport in Santiago, Chile. I had never seen Jorge Dabed-Sumar before this moment in any connection. Although I had been aware of his arrest, I did not direct anyone to interview Dabed-Sumar after his arrest, nor did I direct anyone to torture him.

6. On the airplane, Braniff Flight 988, from Santiago, Chile to Lima, Peru, were Jorge Dabed-Sumar, five other defendants, six Chilean Police officers, a police doctor and five other D.E.A. agents and myself. The defendants were handcuffed and they stayed handcuffed until we arrived in Lima at approximately 9:30 a.m.

7. During the two hour layover in Lima, Peru, the defendants were held in custody by the Peruvian police at the Lima Airport. At approximately 11:45 p.m., the six defendants, the six Chilean officers, the police doctor, four other Drug Enforcement Administration agents (one D.E.A. agent having continued on Flight 988) and myself proceeded onto Braniff Flight 900, a direct flight to Kennedy Airport in New York, arriving in New York at approximately 7:30 a.m.

8. In New York Dabed-Sumar and the six (sic) other defendants were placed under arrest by agents from Region 2 (New York) Drug Enforcement Administration. Since that time, I have not seen Jorge Dabed-Sumar.

CHARLES W. CECIL, JR.
Special Agent
Drug Enforcement Administration
United States Department of Justice."

3. The Court's Ruling

Following Dabed's testimony and oral argument, Judge Gagliardi denied Dabed's motion, ruling that he would not inquire into Chilean law behind the order of expulsion, and that no connection had been alleged in Dabed's testimony between torture and his presence in court. (Tr. 52) After granting Dabed and his counsel additional time to produce documents or proof relating to the motion, and hearing additional oral argument, Judge Gagliardi stated,

"You have separate and distinct proceedings going on in Chile, presumably, which were matters involved with the Chilean Government. Looking at Toscanino and looking at the decision here, it says if the charges of government misconduct in kidnapping Toscanino and forcibly bringing him to the United States is sustained, the foregoing principle would as a matter of due process entitle him to summary relief.

We don't have that at all in this particular case. We really don't. I just don't—and then it goes on in Toscanino, the allegations include corruption and bribery of a foreign official as well as kidnapping, accompanied by violence and brutality to the person.

We don't have any of that here claimed. I don't see any validity to this complaint of Mr. Dabed under the Toscanino decision.

In the light of all the circumstances here I will have to deny the motion." (Tr. 55-56)

ARGUMENT

The Trial Court properly denied Dabed's motion under Toscanino to divest itself of jurisdiction over him.

Dabed's argument that jurisdiction over him was obtained illegally rests on his claim that there are distinguishing factors between his case and the facts in *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975). He contends that these additional facts require this Court to reverse Judge Gagliardi's decision denying his *Toscanino* motion and to direct his release from custody. The contention is without merit.

The facts relating to Dabed's expulsion from Chile to the United States are identical to those in *Lira*. The United States Government advised the Chilean Government of the United States warrant against the defendants; the Chileans arrested the defendants pursuant to this request; an order of expulsion in which both defendants were named was executed by Chilean authorities; the defendants were taken by Chilean police to the airport; at the airport they were examined by a physician, and placed by Chilean police and United States agents on the flight to New York.

Dabed asserts two facts, about which he testified at the *Toscanino* hearing to distinguish his case from that of *Lira*. First, on October 16, 1973 six months before the arrest which led to his being brought to the United States, an American agent, Jorge Frangulis, (hereinafter referred to by his true name George Frangullie) went to Dabed's factory with Chilean informants in an undercover capacity to attempt to buy drugs from him. When he refused, Frangullie and the Chilean informants left and returned shortly thereafter with Chilean police. The Chilean police kicked, slapped and arrested Dabed and subsequently charged him with possession of a bag of white powder found across from his factory which was originally alleged to contain drugs, but which Dabed asserted was later proven not to be drugs. Second, Dabed testified that following his third arrest in February, 1974, after he had been tortured by Chilean police in a back room at the 6th Precinct police offices and returned to his cell, he saw Drug Enforcement Administration Agent Charles Cecil walking out of the room where he had been tortured.

Dabed's motion was denied by the Trial Court because even assuming Dabed's testimony to be true he alleged no connection between these events and his expulsion to the United States in May, 1974. This finding was based

on *Toscanino*, since *Lira* had not yet been before the Court of Appeals.

The holding of *United States v. Toscanino, supra*, 500 F.2d at 275, is

"Accordingly, we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant *where it has been acquired as the result of* the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." (Emphasis supplied)

Here Dabed made no allegations in his testimony of acts by United States government agents unlawful under *Toscanino* and its progeny which were in any way connected with his being brought to the United States. The two specific acts which he argues in his brief distinguish his case from *Lira* are, as Judge Gagliardi found, unrelated to the acquisition by the District Court of jurisdiction over him. The finding, far from undercut by *Lira*, is in fact further supported by this Court's opinion in that case and its gloss on *Toscanino*:

"However, in *United States v. Toscanino, supra*, we held that this general rule, sometimes referred to as the 'Ker-Frisbie doctrine,' is subject to the overriding principle that *where the Government itself secures the defendant's presence in the jurisdiction through use of cruel and inhuman conduct amounting to a patent violation of due process principles*, it may not take advantage of its own denial of the defendant's constitutional rights.

* * * * *

"Essential to a holding that *Toscanino* applies is a finding that the gross mistreatment *leading to the forcible abduction of the defendant* was perpetrated by representatives of the United States Government." (Emphasis supplied.) *United States v. Lira, supra*, 515 F.2d at 70.

There is nothing in the record to support the claim that the allegedly distinguishing October or February events led to Dabed's presence in the United States. Dabed's own testimony that he was released from custody after these incidents establishes the contrary. Unlike *Toscanino*, there are here no allegations that "the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct." *United States v. Toscanino, supra*, 500 F.2d at 275. In fact, Dabed specifically testified that, unlike the prior occasions, he was not tortured or threatened after the April, 1974 arrest (Tr. 24), and he did not claim torture during the detention which led to his expulsion to the United States. (Tr. 24-39)

In an attempt to create the nexus, Dabed argues in his brief first that his "troubles started with the visit of Frangullie." This amounts to nothing more than the "vicarious liability" doctrine raised and rejected in *Lira, supra*, 515 F.2d at 71. No connection is shown between the visit of Frangullie with the two Chilean informants to Dabed's factory in October, 1973 and his arrest and expulsion to the United States in May, 1974. In fact at such time Dabed had not even been indicted in the United States.*

The allegation that in February, 1974, two months before the arrest leading to Dabed's expulsion, Agent

* Furthermore, it is not illegal for an American agent in a foreign country, acting in an undercover capacity, to approach an individual with Chilean informants and police in an attempt to buy drugs, and it certainly does not become illegal if this event precipitates the individual's arrest by the Chileans for possession of a bag of white powder alleged to be cocaine. Cf. *United States v. Rizzuto*, 504 F.2d 419 (2d Cir. 1974) (French undercover agent in United States); *United States v. Barrera*, 486 F.2d 333 (2d Cir. 1973), cert. denied, 416 U.S. 940 (1974) (United States undercover agent in Belgium).

Cecil was seen by Dabed leaving the torture room at the 6th Precinct police offices ten minutes after Dabed was returned to his cell is likewise unconnected by any evidence to Dabed's presence in the United States. Furthermore, as Judge Gagliardi pointed out in denying the motion, the Court had before it Cecil's affidavit stating that "the first time he ever saw Dabed was on May 4th or some time in there, long after this is involved here." (Tr. 55)*

The other allegations by Dabed in his testimony, that he heard English being spoken by unknown persons while he was tortured after the first and third arrests were no more direct evidence of participation by United States government agents in illegal activities than was found to be the case in *Lira*, where similar allegations were made. *United States v. Lira, supra*, 515 F.2d at 71.

* Dabed argues that, despite the absence of any nexus between the alleged acts of brutality and Dabed's arrest and removal from Chile, Dabed's claims of American involvement in improprieties toward Dabed wholly apart from his expulsion from Chile tañt his presence here and require that he be freed. Aside from the inapplicability of the *Toscanino* doctrine to Dabed's claim, analogous prophylactic rules of Constitutional enforcement are in accord with the result reached here. In the judicial gloss on the Fourth Amendment it is settled that the exclusionary rule will not apply to evidence legally seized as part of a search which in other respects exceeded constitutional bounds. *United States v. Artieri*, 491 F.2d 440, 445-447 (2d Cir. 1974). Even if some nexus had been made out between the events of October, 1973, and February, 1974, and Dabed's arrest and expulsion in April and May 1974, and even assuming that Dabed had established illegal conduct by United States agents within the purview of *Toscanino*, it is abundantly apparent under analogous constitutional principles that the relationship between the earlier acts and the expulsion is too attenuated to require that jurisdiction in this country be refused. *Brown v. Illinois*, — U.S. —, 43 U.S.L.W. 4937 (June 26, 1975); *Wong Sun v. United States*, 371 U.S. 471 (1963).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

BANCROFT LITTLEFIELD, JR.,
JOHN D. GORDAN, III,
*Assistant United States Attorneys,
Of Counsel.*

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York }
County of New York }

Bancroft Littlefield, Jr. being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 6th day of October, 1975
he served 2 copies of the within brief
by placing the same in a properly postpaid franked
envelope addressed:

John C. Corbett, Esq.
66 Court St.
Brooklyn N.Y.

And deponent further says that he sealed the said envelope and placed the same in the mail box drop for mailing in front of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Bancroft Littlefield

Sworn to before me this

6th day of October, 1975

Richard Wile
RICHARD WILE
Notary Public, State of New York
No. 31-9670350
Qualified in New York County
Commission Expires March 30, 1976